110 F.3d 543 printed in FULL format.

Ralph Read, M.D., Plaintiff-Appellee, v. Medical X-Ray Center, P.C., a South Dakota professional corporation; Defendant-Appellant, Lynn A. Hendrickson; Daryl R. Wierda, Defendants. Ralph Read, M.D., Plaintiff-Appellant, v. Medical X-Ray Center, P.C., a South Dakota professional corporation; Lynn A. Hendrickson, M.D.; Daryl R. Wierda, M.D., Defendants-Appellees. Ralph Read, M.D., Plaintiff-Appellant, v. Medical X-Ray Center, P.C., a South Dakota professional corporation, Defendant-Appellee.

No. 95-3396SD, No. 95-3530SD, No. 95-3897SD

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

110 F.3d 543; 1997 U.S. App. LEXIS 6481;
1997-1 Trade Cas. (CCH) P71,763

October 21, 1996, Submitted
April 2, 1997, Filed

SUBSEQUENT HISTORY: [**1] Rehearing and Suggestion for Rehearing En Banc Denied May 9, 1997, Reported at: 1997 U.S. App. LEXIS 11331.

PRIOR HISTORY: Appeals from the United States District Court for the District of South Dakota. CIV 92-4095. Honorable John B. Jones, District Judge.

DISPOSITION: MXC's appeal reversed and Dr. Read's cross appeal affirmed.

COUNSEL: Counsel who presented argument on behalf of the appellant was John J. Miles, Washington, D.C. Additional attorneys appearing on the brief were Mark D. Baute, Los Angeles, CA; William Fuller, Frederick M. Entwistle and James E. Moore, Sioux Falls, SD.

Counsel who presented argument on behalf of the appellee was Richard R. Winter, Chicago, IL. Additional attorneys appearing on the brief were Henry S. Allen, Jr., Chicago, IL and Steven W. Sanford, Sioux Falls, SD.

JUDGES: Before FAGG, HEANEY, and HANSEN, Circuit Judges.

OPINION BY: FAGG

OPINION:

[*544] FAGG, Circuit Judge.

After twelve years as a partner in Medical X-Ray Center, P.C., a group of radiologists in Sioux Falls, South Dakota, Dr. Ralph Read quit and set up a competing independent practice. When his own practice failed, Dr. Read brought this antitrust lawsuit against Medical X-Ray Center and two of its doctors, Lynn A. Hendrickson and Daryl R. Wierda (collectively MXC), asserting MXC engaged in anticompetitive conduct and MXC's conduct prevented Read from competing successfully in the Sioux Falls area. A jury found in Dr. Read's favor on his Sherman Act conspiracy and monopolization claims. See 15 U.S.C. §§ 1, 2 (1994). Finding no evidence of conspiracy, the district court overturned the jury's verdict on Dr. Read's conspiracy claim and entered judgment as a matter of law (JAML). The district court upheld the jury's verdict on Dr. Read's monopolization claim, however, even though the court believed Read's practice

failed because of his practice's competitive [**2] shortcomings rather than any anticompetitive conduct by MXC. MXC appeals, and Dr. Read cross appeals. Viewing the evidence in the light most favorable to Dr. Read, see Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483, 1505 (8th Cir. 1992), we conclude a reasonable jury could only find Dr. Read's business failed because of his own competitive flaws. Thus, Dr. Read did not establish causation, an essential element of his case, and we reverse on MXC's appeal and affirm on Dr. Read's cross appeal.

In 1987, Dr. Read decided his MXC work schedule was too rigorous. Dr. Read's family wanted to stay in Sioux Falls, but his contract with MXC contained a covenant not to compete for two years within a twenty-five mile radius of the city. Read proposed several options for reduced workload and compensation. Most were rejected, but MXC agreed to employ Read as an independent contractor and continued to include Read on its hospital schedules. Read left the partnership in 1988, worked as an independent contractor for a year, and renewed the contract for a second year. When the second contract expired, MXC offered to renew it, but Read told MXC he was being exploited and he [*545] intended to launch his own [**3] practice. According to Dr. Read, MXC's Dr. Soye told him MXC "would fight [him] every step of the way."

When he started his own business in June 1990, Read targeted only a hospital-based diagnostic radiology practice. For several years, MXC radiologists had been the only ones practicing at Sioux Falls' largest hospitals, Sioux Valley Hospital (SVH) and McKennan Hospital. MXC rather than the hospitals scheduled the individual radiologists to ensure 24-hour coverage. Dr. Read in-

formed SVH, McKennan, and MXC that he was willing to take his fair share of night call and weekends, but that he would not be available himself 24 hours every day of the week. SVH had an open staff and Read had privileges to practice radiology, so Read posted schedules at SVH showing the hours he would be on the premises. On one schedule, Read indicated he would only be at SVH for three hours a day. Dr. Read carried a beeper, but the schedule stated any urgent work should be performed by other radiologists, that is, MXC doctors, when Read was not there.

Dr. Aspaas, SVH chief of staff at the time, felt SVH's primary care doctors should be able to choose between MXC or Dr. Read for their patients' radiology [**4] needs. When Dr. Aspaas suggested a choice card system, Read proposed language that would permit SVH's physicians to choose Read to interpret their x-rays if he was available, but to default their choice to MXC if Read was not at the hospital. MXC would not agree to become Dr. Read's safety net, however. Instead, the choice card system put in place allowed doctors to choose between MXC and Dr. Read's independent practice on a case-by-case basis. Dr. Read then sent letters to the SVH doctors advertising quality care at prices well below MXC's. MXC did not retaliate against the SVH doctors who chose Dr. Read, but actually provided coverage when Dr. Read was not there.

MXC was willing to incorporate Read on its SVH schedule to ensure 24-hour coverage of his patients if Dr. Read signed a coverage contract and provided his own schedule in advance. The proposed contract stated Read would pay MXC an unspecified sum to cover Read's cases when Read was not on SVH premises, and MXC would

bill the patients directly for its services. Read did not acknowledge the offer for three months because he thought it was a practical joke. Read believed MXC had an ethical obligation to cover his patients, [**5] and he did not have to pay MXC anything for backing him up. In February 1991, Read informed MXC of his refusal to negotiate a coverage contract for any price. Around the same time, Dr. Read accepted a fellowship at the University of Nebraska Medical Center in Omaha that he had applied for the previous December.

On appeal, MXC asserts the district court should have granted JAML on Read's § 2 monopolization claim because the failure of Read's practice was caused by the practice's deficiencies rather than any predatory conduct by MXC. According to MXC, Read caused his own injury by failing to provide 24-hour service for his patients and by refusing to work a reasonable schedule. On the other hand, Dr. Read contends his practice failed because MXC had foreclosed every viable practice option by refusing to cooperate at SVH, entering into exclusive contracts at the other hospitals and the Central Plains Clinic, and placing restrictive covenants in MXC's employment contracts. Having carefully reviewed the record, we agree with MXC that Dr. Read caused his own business's demise.

To prevail on his antitrust claims, Dr. Read had to show a reasonable jury could find MXC's allegedly anticompetitive [**6] conduct was "a material cause" of his injury. National Ass'n of Review Appraisers & Mortgage Underwriters, Inc. v. Appraisal Found., 64 F.3d 1130, 1135 (8th Cir. 1995), cert. denied, 134 L. Ed. 2d 779, 116 S. Ct. 1676 (1996); Amerinet, 972 F.2d at 1490; see Brown v. Presbyterian Healthcare Servs., 101 F.3d 1324,

1335 (10th Cir. 1996) (causation requirement applies to private plaintiffs seeking to invoke antitrust laws), pet. for cert. filed, 65 U.S.L.W. 3611 (Feb. 26, 1997) (No. 96-1365). A material cause is a "substantially contributing factor." National Ass'n of Review Appraisers, 64 F.3d at 1135. Dr. Read cannot recover if the decline of his [*546] business was attributable to causes other than MXC's behavior. Id.

As the district court observed, Dr. Read did not take reasonable steps to compete head-to-head with MXC in the inpatient radiology market. The hospitals and primary care doctors desired 24-hour service for their patients. MXC provided this service, and Dr. Read did not. When MXC proposed a reasonable written contract that would have solved Dr. Read's coverage problem, Read refused to discuss the proposal. Thus, Read's lack of coverage cannot be blamed on MXC. Dr. Read [**7] made the voluntary choice not to provide round-the-clock service, either by doing it himself, or by hiring someone else, and this was his downfall. Dr. Read presented no evidence that any individual MXC doctor wanted to cover Dr. Read but could not because of MXC's restrictive covenants. Simply put, Read was trying to force MXC to cover his business without following the medical community's normal coverage practices—paying MXC compensation for the service or agreeing to back up MXC doctors in exchange. Read wanted to "free-ride," avoid the cost of 24-hour coverage by forcing MXC to provide it to him for free, so he could undercut MXC's prices.

Read's lack of coverage cost him business at SVH and McKennan. Some SVH doctors who initially chose Dr. Read switched to MXC when Dr. Read told them he could not provide 24-hour coverage. When McKennan ex-

pressed concern to Dr. Read about his coverage deficiency, Dr. Read did nothing to address it. McKennan then made a unilateral decision to deal with MXC exclusively, despite MXC's refusal of an exclusive contract, because of concerns about patient care.

As for other potential clients, Dr. Read made little or no effort to pursue them. The Sioux [**8] Falls Veterans' Administration (VA) Hospital had an open bid process for an exclusive contract. Dr. Read did not submit a bid, even though his restrictive covenant had expired before the bidding closed. MXC submitted the lowest bid and was awarded the exclusive contract. Similarly, Dr. Read failed to compete for a contract at Central Plains Clinic (CPC). The CPC business manager testified Dr. Read never asked for clinic business, and Read admitted he never made "a special effort to seek them out." At Canton-Inwood Hospital, a facility twenty miles from Sioux Falls, Dr. Read refused to commit to a partnership with the MXC radiologist who had an independent contract there, so the radiologist sought the help of other MXC doctors. As for the SVH Outreach program, SVH alone decided not to use Dr. Read because of his limited availability. See Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1459, 1462 (11th Cir. 1991) (no causation under §§ 1 or 2 where radiologists, regardless of their personal wishes, were not causally responsible for hospital's unilateral decision to deny competing radiologist privileges).

We conclude no reasonable jury could find MXC's conduct was a "substantially [**9] contributing factor" to the failure of Dr. Read's independent practice. National Ass'n of Review Appraisers, 64 F.3d at 1135. The decline of Dr. Read's business was caused by factors other than MXC's

allegedly anticompetitive behavior. See id. Dr. Read rejected MXC's offer to negotiate a formal coverage agreement, did not respond to McKennan's concern that he would not cover his practice there, did not compete with MXC for contracts at the VA and CPC, and was excluded from the SVH Outreach program and Canton because of unilateral decisions by their administrators. Thus, the district court properly granted JAML on the § 1 conspiracy claim, and should have granted JAML on the § 2 monopolization claim as well. See id. at 1136 (causation is an essential element of 15 U.S.C. §§ 1, 2 claims).

Given the absence of causation, we need not decide whether MXC engaged in illegal anticompetitive behavior. See id. at 1134. Nevertheless, we believe Dr. Read's injury was caused by legitimate competition rather than anticompetitive conduct. In our view, MXC's insistence on a coverage contract from a price-chopping competitor was not unreasonable or anticompetitive. See Blue Cross [**10] & Blue Shield v. Marshfield Clinic, 65 F.3d 1406, 1413-14 (7th Cir. 1995), cert. denied, 134 L. Ed. 2d 233, 116 S. Ct. 1288 (1996); Konik v. Champlain [*547] Valley Physicians Hosp. Med. Ctr., 733 F.2d 1007, 1014 (2d Cir. 1984). MXC had legitimate business justifications for its actions towards Dr. Read. See Trace X Chem., Inc. v. Canadian Indus., 738 F.2d 261, 266 (8th Cir. 1984); Konik, 733 F.2d at 1014.

We now turn to the points raised in Dr. Read's cross appeal. Given our rejection of the monopolization claim for lack of causation, the district court properly dismissed the attempted monopolization claim. Absence of causation also disposes of the tortious interference claim. See National Ass'n of Review Appraisers, 64 F.3d at 1137. Because we have reversed Dr. Read's only prevail-

ing claim, we need not consider his arguments about certain jury instructions, which are unrelated to our decision, future damages, and dismissal of the individual defendants. Since Dr. Read suffered no antitrust injury, we reverse the award of attorney fees. See 15 U.S.C. § 15(a).

Without doubt, an independent practice is a challenging undertaking. Dr. Read sought the perks of independent practice, [**11] setting his own hours and not having to deal with other partners, without one of the drawbacks, always being on call. Dr. Read chose not to provide the coverage and availability offered by his competitor, MXC, and for this reason potential clients chose MXC over Dr. Read's competing practice. Dr. Read's problem is, the antitrust laws were enacted to protect competition, not competitors. See Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990).

Accordingly we reverse the district court's judgment on MXC's appeal, and we affirm the district court's judgment on Dr. Read's cross appeal.

RALPH READ, M.D., Appellee/Cross-appellant, vs. Medical X-Ray Center, P.C., a South Dakota professional corporation, Appellant/Cross-appellee

No. 95-3396/95-3530/95-3987

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

1997 U.S. App. LEXIS 11331

May 9, 1997, Decided

PRIOR HISTORY: [*1] civ-92-4095

Original Opinion of April 2, 1997, Reported at: *1997 U.S. App. LEXIS 6481.*

COUNSEL: Counsel who presented argument on behalf of the appellant was John T. Miles, Washington, D.C. Additional attorneys appearing on the brief were Mark D. Baute, Los Angeles, CA; William Fuller, Frederick M. Entwistle and James E. Moore, Sioux Falls, SD.

Counsel who presented argument on behalf of the appellee was Richard R. Winter, Chicago, IL. Additional attorneys appearing on the brief were Henry S. Allen, Jr., Chicago, IL and Steven W. Sanford, Sioux Falls, SD.

OPINION: Order Denying Petition for Rehearing and suggestion for Rehearing En Banc.

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 9, 1997

App. 11

[Dated September 14, 1995]

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

RALPH READ, M.D., Plaintiff, -vs- MEDICAL X-RAY CENTER, P.C., a South Dakota professional corporation, Defendant.	CIV 92-4095 MEMORANDUM OPINION AND ORDER ON POST-TRIAL MOTIONS

Appearances:

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This case is a civil antitrust action in which the plaintiff alleges claims under Sections 1 and 2 of the Sherman Act. The case was tried to a jury that rendered a verdict for the plaintiff and awarded him damages of $608,000 which was subsequently tripled. The jury trial commenced on January 31, 1995 and concluded on February 20, 1995. Post-trial motions were heard on June 19, 1995.

Defendant filed a Petition for Certification of Judgment on Jury Verdict Pursuant to Fed.R.Civ.P. 54(b), Doc. 508, which was summarily denied.

The following post-trial motions were taken under advisement:

1. Defendant's Motion for Judgment as a Matter of Law, or Alternatively, For a New Trial, Doc. 516.

2. Plaintiff's Motion for New Trial and to Alter or Amend Judgment, Doc. 519.

3. Plaintiff's Petition for Attorneys Fees, Doc. 521.

4. Plaintiff's Petition for Injunctive Relief, Doc. 525.

I. Background

Defendant Medical X-Ray Center, P.C. (MXC) is the only radiology group practicing in Sioux Falls, South

Dakota. Plaintiff Ralph Read (Read) is a radiologist who worked either as a partner or employee of the defendant for 15 years. The facts as they relate to the respective motions will be discussed with the motions.

II. Defendant's Motion for Judgment or New Trial

Defendant has moved for judgment as a matter of law on the issue of liability or alternatively for a new trial on the issue of damages. These issues have been briefed separately and will be considered separately herein.

On a motion for judgment as a matter of law the evidence must be viewed in the light most favorable to the prevailing party. *General Industries Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 801 (8th Cir. 1987). The Court is not allowed to "reweigh the evidence or to reach a different result as long as there is sufficient evidence in the record from which the jury could reasonably conclude [as it did]." *Id.* "If there is any evidence to support the jury's finding that the elements of the [ ] claim were proven, the jury's verdict must be upheld." *Id.*

I. Defendant's Motion on Liability

Defendant's motion for judgment or new trial on the issue of liability is based on the following six grounds which will be considered separately:

a. Plaintiff's failure to prove a proper product or geographic relevant market;

b. Plaintiff's failure to prove monopoly power;

c. The lack of any evidence of predatory conduct or market foreclosure;

d. The lack of any evidence supporting a conspiracy;

e. Plaintiff's failure to prove anti-trust injury; and

f. Plaintiff's lack of anti-trust standing.

a. Relevant Market

The relevant market selected by plaintiff in this case was the hospital inpatient diagnostic radiology services market within a 25-mile radius of Sioux Falls, South Dakota.

This is a very limited relevant market based on Dr. Monica Noether's testimony and on the fact that plaintiff sought only to engage in an inpatient diagnostic radiology practice.

At least one circuit court has held the relevant product market consisted of all radiology services, rather than being divided into inpatient and outpatient markets. *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1489-90 (9th Cir. 1991). The plaintiff in *Morgan*, sought to define the relevant product market as "referrals to Tucson nonuniversity medical radiologists." *Id.* The Court held there was not sufficient evidence to exclude university and osteopathic radiologists' services from the relevant market. *Id.* The Court also determined insufficient evidence existed to exclude from the relevant market the radiology services performed by nonradiologists. *Id.*

The jury in this case found plaintiff's market to be a proper relevant market. Defendant has suggested no other relevant market that would be applicable to this case. I am unwilling to grant a new trial on this issue.

b. Monopoly Power

The defendant clearly has the only radiology group practice in the Sioux Falls area, although individual practicing physicians and clinics sometimes read their own x-rays. As such, it has about ninety percent of the relevant market, that is, it does most of the inpatient radiology work in the Sioux Falls hospitals. The issue of monopoly power was a factual issue submitted to the jury in Instruction 19, and the jury clearly found against the defendant on this issue. There is evidence in the record to support this finding.

c. Predatory Conduct or Market Foreclosure

There was evidence at trial which could support the jury's finding that defendant was guilty of predatory conduct as it related to other potential competitors. The most explicit evidence of defendant trying to keep others out of their business is trial exhibit 64, which is a letter from defendant to Dr. W.A. Boade warning Dr. Boade to stay out of defendant's "turf" in "MR" or defendant would start invading Dr. Boade's "turf" in nuclear medicine.

The primary issue of either predatory conduct or market foreclosure as it relates to plaintiff involved the issue of defendant providing back-up coverage for plaintiff's Sioux Valley Hospital practice. Plaintiff claimed at trial that defendant's refusal to provide back-up coverage to him foreclosed him from practicing diagnostic radiology in Sioux Falls. Evidence at trial demonstrated that defendant offered to provide such personal services for a fee. Trial exhibit 706. Plaintiff refused this offer and asserted he would not pay defendant even $1.00 for

back-up because defendant would be paid by patients for services rendered by defendant while covering for plaintiff. See trial exhibit 944. Evidence at trial indicated that one of the reasons plaintiff resigned from defendant was that he did not want to be on call, i.e. provide back-up, immediately after working a full day. The evidence is clear that plaintiff in establishing an inpatient radiology practice did not intend to provide any back-up for periods when he was not physically at the hospital.

The Court does not believe defendant was obligated to provide back-up services to plaintiff.

If one of the defendant's radiologists desires to obtain back-up coverage, he or she must pay either another of defendant's radiologist or a locum tenens radiologist to provide such services.

d. Conspiracy

The jury was given Instruction 15 which required them to find defendant and one or more other persons entered into contracts, combinations or conspiracies which had a substantially harmful effect on competition in the relevant market for them to find defendant liable under section 1 of the Sherman Act, 15 U.S.C. § 1. As defendant is the only radiology group in Sioux Falls, the only other potential participants in such a conspiracy would be the three hospitals in Sioux Falls. There was evidence that defendant had an agreement with Central Plains Clinic to do all of its radiology work, but this would not constitute evidence of a conspiracy to monopolize the hospital inpatient diagnostic radiology market.

A conspiracy exists where the persons involved had "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Morgan*, 924 F.2d at 1488 (citations omitted). Each hospital is separately discussed below.

Sioux Valley. Plaintiff's privileges to practice diagnostic radiology were not revoked by Sioux Valley Hospital. There was evidence at trial that Sioux Valley took several steps to assist plaintiff in establishing his radiology practice. For example, choice cards were sent to all of the physicians with privileges at Sioux Valley, allowing such physicians to choose either defendant or plaintiff to interpret their patients' x-rays. Plaintiff did practice at Sioux Valley for a period of time following his resignation from defendant.

Considering all the evidence at trial concerning Sioux Valley's efforts to assist plaintiff it is clear that Sioux Valley was not part of a conspiracy with defendant to exclude plaintiff from practicing radiology in Sioux Falls.

McKennan. The evidence establishes that McKennan Hospital wanted to enter into an exclusive contract with defendant for inpatient diagnostic radiology services, but that the defendant refused to enter into such agreement. It is clear that McKennan Hospital was satisfied with the services provided by defendant and wanted to deal exclusively with it.

Plaintiff was not allowed to practice radiology at McKennan once he was no longer a member of defendant based on McKennan's desire to use defendant for all of its radiology services. There is no evidence that defendant sought or encouraged plaintiff's exclusion from McKennan Hospital.

Evidence that McKennan Hospital used defendant exclusively did not establish that McKennan Hospital and defendant conspired to prevent plaintiff from practicing inpatient diagnostic radiology.

VA. Defendant has a written exclusive contract with the Veterans Administration Hospital (VA). Plaintiff was not allowed to practice radiology at the VA once he was no longer a member of defendant. However, there is evidence in the record indicating defendant had to compete with a radiology firm from Cincinnati, Ohio, for the VA contract and that plaintiff could also have submitted a bid for this contract.

Plaintiff contends a contract, as well as a conspiracy, is sufficient to impose liability under Section 1, however, an exclusive contract for the provision of medical services is not necessarily violative of Section 1, as has been held by several courts addressing this issue. *See BCB Anesthesia Care, Ltd. v. Passavant Memorial Area Hosp. Ass'n,* 36 F.3d 664, 667-68 (7th Cir. 1994).

e. Antitrust Injury

Defendant contends plaintiff wholly failed to establish causal antitrust injury because his damages proof at trial was insufficient and he was not a bona fide competitor in the radiology business. The issue of damages is discussed in section 2 of this opinion, and the issue of whether plaintiff was a competitor is discussed immediately below.

The Ninth Circuit has explained that "even a prospective participant in a market may suffer antitrust injury, if it has taken 'substantial demonstrable steps to enter

an industry and . . . is thwarted in that purpose by antitrust violations.'" *In Re Dual-Deck Video Cassette Recorder Antitrust Litigation,* 11 F.3d 1460, 1464-65 (9th Cir. 1993), *quoting Solinger v. A&M Records, Inc.,* 586 F.2d 1304 (9th Cir. 1978).

Plaintiff testified about the efforts he expended to obtain work at Sioux Valley, with the Outreach Program of Sioux Valley, with Dr. Leland Larson at Canton-Inwood and at the VA. Plaintiff explained he did not need an office outside of his home, or equipment to run his radiology business, because he was seeking to compete only in the hospital inpatient market where he could use the hospitals' equipment in reading x-ray films and intended to maintain an office in his home. As far as plaintiff's billing procedure, he testified his wife assisted him in billing his patients.

Plaintiff's business plan was to develop a clientele of referring doctors by charging fees for reading x-rays which were dramatically lower than those charged by defendant, and to offset this lower business income by eliminating all normal business expenses of having an office, staff or equipment. His plan was based on requiring defendant to cover his practice without any cost to him, since he clearly did not intend to cover his practice in any way when he was not physically present in the hospital. He was unwilling to enter into any contractual arrangement with defendant to cover his practice.

Plaintiff set up an extremely limited period of time at Sioux Valley Hospital when he would be available to read x-rays of inpatients of his referring physicians. Trial exhibit 659. With his stated hours of availability at only three hours a day, he needed a lot of coverage when he

was not there. In my opinion, the issue of coverage of plaintiff's practice is the most crucial issue in this case. A single medical practitioner with plaintiff's practice clearly could not generate sufficient income to pay anyone else to cover his practice when he was not available. It is clear from the record that the reason plaintiff left defendant was his almost pathological dislike of being on-call on evenings and weekends, and his unwillingness to hire others to do his on-call assignments, so he clearly did not intend to cover his practice himself by coming to the hospital whenever there was an x-ray for him to read.

It is clear to me plaintiff's primary impediment to development of a radiology practice was his unwillingness to work any kind of a reasonable work schedule and to make any provisions for covering his practice.

Plaintiff's cause of action is largely premised on the proposition that defendant had a duty to cover plaintiff's practice on plaintiff's terms, that is, without having any written agreement for doing so and without any payment, even nominal.

Plaintiff's desire to set up an inpatient diagnostic radiology practice was thwarted in my opinion not by antitrust violations but by his own unwillingness to make any reasonable attempt to cover his radiology practice when he was not physically in the hospital. He meets this unwillingness to cover with the position that defendant had an obligation to provide cover for his practice without having any agreement for doing so. In my opinion, defendant had no obligation to cover his practice, particularly in view of plaintiff's unwillingness to advise defendant when he was or was not going to be available.

I do not believe plaintiff ever became or took reasonable steps to become a bona fide competitor in the inpatient radiology market for the reasons stated.

f. Standing

Defendant contends plaintiff does not have standing to bring this antitrust action. Defendant asserts that plaintiff did not establish antitrust injury and that consumers of its services are the appropriate and efficient enforcers of the antitrust laws in this case.

Congress intended 15 U.S.C. § 15 to provide a broad private remedy for antitrust violations. *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472-73 (1982). Therefore, although other persons may have been able to enforce the antitrust laws against defendant, plaintiff had standing to enforce such laws against defendant under 15 U.S.C. § 15. 2.

II. Defendant's Motion on Damages

There was extensive pretrial and trial attention to the issue of liability, but the same careful attention was not devoted to damages. Plaintiff's expert economist, Dr. Ralph Brown, prepared an opinion based on a number of assumptions. At some point in the plaintiff's testimony, the Court advised counsel it was the Court's opinion that there was no factual evidence in the record to support Dr. Brown's assumptions as disclosed in his pretrial computations. When Dr. Brown was called to testify, he made no reference to his pretrial computations.

The issue raised by this motion is whether there was sufficient evidence in the record to support the jury's damage computations. I conclude that there is, since there was considerable testimony with regard to radiologists' incomes. I do not find the damage verdict to be so large as to be unsupported by the evidence. Defendant's motion for a new trial on damages will be denied.

III. Plaintiff's Motion For New Trial or To Amend Judgment

Plaintiff seeks to have the judgment amended to include judgment against the individually named defendants who have been previously dismissed, and seeks judgment on the plaintiff's claim of tortious interference with business relations. Alternately, plaintiff seeks a new trial on these issues if the judgment is not amended as requested, and seeks a new trial on the issue of punitive damages and future damages.

This motion calls into question the decisions made on these issues during the trial. The Court holds the view that these issues were correctly decided during the trial and this motion will be denied in all respects.

IV. Plaintiff's Motion For Attorneys Fees

Plaintiff seeks attorneys fees and expenses in the amount of $1,384,274.02. Petition, p. 14.

The Supreme Court has instructed that the district court should award attorneys fees only in an amount "reasonable in relation to the results obtained." *Hensley v. Eckerhart,* 461 U.S. 424, 440 (1983). Therefore, attor-

neys fees may be reduced due to limited success at trial. *DeGidio v. Pung*, 920 F.2d 525, 533 (8th Cir. 1990). The fee award may also be reduced "if the documentation of the hours is inadequate or if the hours were not reasonably expended." *Id.* Furthermore, in cases involving multiple claims "the hours spent on the unsuccessful claim[s] should be excluded in considering the amount of a reasonable fee." *Loggins v. Delo*, 999 F.2d 364, 369 (8th Cir. 1993), *quoting, Hensley*, 461 U.S. at 440. Defendants are not required to pay for duplication of services by plaintiffs' attorneys. *A.J. v. Kierst*, 56 F.3d 849, 864 (8th Cir. 1995).

In this case the jury was instructed on only two of plaintiff's nine claims and all of the individual defendants were dismissed prior to trial. Plaintiff's attorneys therefore spent a considerable amount of time pursuing unsuccessful claims. Plaintiff's attorneys also spent time pursuing several unsuccessful motions prior to and at trial. In addition the jury did not award plaintiff any future-14 damages. As discussed later in this opinion, plaintiff is entitled to injunctive relief only if he establishes a radiology practice in or near Sioux Falls. Plaintiff therefore obtained only limited success in this action.

During the depositions taken in this case, plaintiff was usually represented by two or three attorneys. The Court finds such duplication of services unnecessarily increased the amount of time expended in preparing plaintiff's case.

Plaintiff incurred substantial expenses pursuing opinions from experts who did not give their opinions at trial. For example, Dr. Young and Dr. Grazier, who were to testify regarding plaintiff's essential facilities claim, were

excluded at trial as cumulative. Dr. Brown's entire damages analysis was discarded at trial, due at least in part to a lack of evidence to support it.

a. Claimed Attorneys Fees

McBride Baker & Coles	Hours	Rate	
Henry S. Allen, Jr.	1,486.00	$250	$371,500.00
Richard R. Winter	3,170.65	180	570,717.00
Nancy L. Pionk	194.95	140	27,293.00
Other attorneys	89.40	var.	16,090.20
Total claimed, McBride, Baker & Coles			985,600.20

Cadwell, Sanford & Deibert	Hours	Rate	
Steven W. Sanford	840.20	$200	$168,040.00

Based upon plaintiff's limited success in this action, duplication of services particularly at depositions, and pursuit of cumulative expert testimony, some reduction of time claimed by the respective attorneys is required. There is no method of computing a reduction in claimed time with mathematical precision, but I have considered the total hours claimed and my perception of the involvement of counsel as shown on Plaintiff's Exhibits A and B and their participation in hearings and trial.

Mr. Allen appears to be the initial attorney involved in this case and the senior attorney involved. He was present throughout the trial but was involved in court only in connection with settlement of jury instructions. I conclude that his total hours should be reduced to 1,200 hours.

Plaintiffs Exhibit B indicates a historic rate of $210 for Mr. Allen, and I conclude that a rate of $200 would be a reasonable rate for his time.

Mr. Winter is the attorney devoting the most time to this case and appears to have had principal responsibility for pretrial proceedings and conduct of the trial. I conclude his total hours should be reduced to 2,500 hours. His historic rate started at $140 per hour and increased on Exhibit B to $180 per hour. While his success in this case may justify increasing his historic rate in the future, I conclude that a rate of $140 per hour would be reasonable in this case.

Based on these reductions, I conclude that Ms. Pionk's claimed fees should be reduced to 170 hours at $120 per hour. The other attorneys category will be reduced to 89 hours at the rate of $100 per hour.

Plaintiff's Exhibit indicates a historic rate of $120 for Mr. Sanford. His affidavit indicates that his agreement with the plaintiff was for $120 per hour in periodic billings with a total of $200 per hour to be charged after the case is concluded. I conclude that a reasonable fee for Mr. Sanford would be a fee computed at $140 per hour and that he should be allowed a total of 720 hours.

b. Allowed Attorneys fees

McBride Baker & Coles	Hours	Rate	
Henry S. Allen, Jr.	1,200	$200	$240,000.00
Richard R. Winter	2,500	140	350,000.00
Nancy L. Pionk	170	120	20,400.00
Other attorneys	89	100	8,900.00
Total claimed, McBride, Baker & Coles			619,300.00

Cadwell, Sanford & Deibert	Hours	Rate	
Steven W. Sanford	720	$140	$100,800.00

Plaintiff claims $79,364.40 for time expended by paralegals in preparing his case. The Eighth Circuit has held that "[w]ork done by paralegals is compensable if it is work that would have been done by an attorney." *Miller v. Alamo,* 983 F.2d 856, 862 (5th Cir. 1993). The rates claimed for paralegals in this case range from $25 per hour to $75 per hour. In reviewing the invoices issued by the attorneys in this case, Doc. 523, the Court finds paralegals performed some duties which were "purely clerical in nature," *Id.,* and spent an unreasonable amount of time completing some of the tasks assigned to them. Therefore, the Court finds the proper amount of paralegal fees recoverable by plaintiff is $50,000.00.

Plaintiff claims $11,311.42 for sales tax payable for fees earned by Steve Sanford. The Court is allowing Steve Sanford to recover $100,800.00 and the sales tax on such fees amounts to $6,048.00. While it is possible that McBride Baker & Coles will be required to pay some South Dakota sales taxes, the amount is speculative at this time, and no sales tax will be allowed on their fees.

Plaintiff claims expenses totaling $58,716.66 for photocopying ($35,537.76), postage and delivery ($7,739.64), secretarial overtime ($3,522.33), telephone ($4,494.04), facsimile ($7,099.95), and other expenses ($322.94). For the same reasons stated above in connection with attorneys fees, the Court will not allow all of the expenses claimed by plaintiff. *See DeGidio,* 920 F.2d at 533 (af-

firming a 75% reduction of allowed costs); *Winter v. Cerro Gordo County Conservation Bd.*, 925 F.2d 1069, 1074 (8th Cir. 1991) (affirming complete denial of expenses for telephone calls, expert witnesses, travel, photocopies, food and lodging, computer legal research, depositions and filing fees). The Court finds the following amounts are reasonable allowances for the respective expenses: photocopying $20,000.00; postage and delivery $6,000.00; secretarial overtime $0.00; travel $40,000.00; telephone $4,000.00; facsimile $5,000.00; other expenses $0.00.

The cost of computer research is not separately recoverable as an expense, rather it is to be factored into the attorney's hourly rate. *Standley v. Chilhowel R-School Dist.*, 5 F.3d 319, 325 (5th Cir. 1993). Therefore plaintiff's claimed expense of $10,506.53 for computerized research will not be allowed.

The following chart summarizes the fees and expenses claimed by plaintiff and the amounts allowed by the Court:

	Claimed	Allowed
Attorney Fees		
McBride Baker & Coles	$985,600.20	$619,300.00
Cadwell, Sanford & Deibert	168,040.00	100,800.00
Paralegals	79,364.40	50,000.00
Sales Tax - Sanford Firm	11,311.42	6,048.00
Sales Tax - McBride Firm	13,478.40	0.00
Photocopying	35,537.76	20,000.00
Postage and Delivery	7,739.64	6,000.00

Secretarial Overtime	3,522.33	0.00
Travel	57,252.41	40,000.00
Telephone	4,494.04	4,000.00
Facsimile	7,099.95	5,000.00
Computerized Research	10,506.53	0.00
Other	322.94	0.00
TOTALS	$1,384,274.02	$851,148.00

V. Plaintiff's Motion For Injunctive Relief

Plaintiff seeks to enjoin defendant from enforcing restrictive covenants in its employment agreements and from enforcing any exclusivity contract with Central Plains Clinic. Defendant objects thereto on the basis that plaintiff is no longer a participant in the Sioux Falls radiology market.

I conclude that all injunctive relief in this case should be conditioned on plaintiff's re-entry into the radiology business in the Sioux Falls market. If he does re-enter this market, defendant will be enjoined from (1) enforcing its employment contract non-compete covenants against any partners or employees who join plaintiff's radiology practice, and (2) from asserting any exclusivity agreement if plaintiff seeks to obtain radiology referrals from Central Plains Clinic.

CONCLUSION

For the reasons previously stated, defendant is entitled to judgment on plaintiff's Section 1 claims because in my opinion there is no evidence that McKennan Hospital,

Sioux Valley Hospital, or the Veterans Administration Hospital conspired with the defendant to prevent plaintiff from practicing inpatient diagnostic radiology in or near Sioux Falls.

With regard to plaintiff's Section 2 claim, it is my view that plaintiff's radiology practice in Sioux Valley Hospital failed because of his failure to provide coverage for his practice, and that defendant was not obligated to furnish such coverage in the absence of an agreement between the parties. I would find that plaintiff failed to prove an antitrust injury for the reasons set out in section II(1)(e).

However, this is a factual issue which was submitted to the jury under proper instructions and they found to the contrary. I feel obligated to yield my views of the facts to the jury's findings.

Many of the practices of which plaintiff now complains were adopted with his approval during the period he was a partner in defendant, but I conclude that is no defense in this case.

Therefore upon the record herein,

IT IS ORDERED:

(1) That Defendant's Petition for Certification of Judgment on Jury Verdict Pursuant to F.R.Civ. P. 54(b), Doc. 508, is denied.

(2) That Defendant's Motion for Judgment as a Matter of Law, or Alternatively, For a New Trial, Doc. 516, is denied.

(3) That Plaintiff's Motion for New Trial and To Alter or Amend Judgment, Doc. 519, is denied.

(4) That Plaintiff's Petition for Attorneys Fees, Doc. 521, is granted to the extent that plaintiff shall recover attorneys fees and costs from the defendant in the amount of $851,148.00, and is denied in all other respects.

(5) That Plaintiff's Petition for Injunctive Relief, Doc. 525, is granted to the extent that in the event plaintiff reestablishes a radiology practice in or near Sioux Falls, South Dakota, the defendant is enjoined from enforcing its employment contract non-compete covenants against any partners or employees who join plaintiff's radiology practice and from asserting any exclusivity agreement if plaintiff seeks to obtain radiology referrals from Central Plains Clinic, and is denied in all other respects.

Dated this _____ day of September, 1995.

BY THE COURT:

_____
Senior U.S. District Judge

ATTEST:

WILLIAM F. CLAYTON, CLERK

BY: _____
DEPUTY

(SEAL)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

RALPH READ, M.D.,	)	CIV92-4095
	)	
Plaintiff,	)	
	)	
vs.	)	AMENDED FINAL JUDGMENT
	)	
MEDICAL X-RAY CENTER, P.C., a South Dakota professional corporation,	)	
	)	
	)	
Defendant.	)	

The Court having entered its Memorandum Opinion and Order on post trial motions on this civil antitrust action, final judgment is entered, as follows; it is

ORDER, ADJUDGED AND DECREED that plaintiff Ralph Read, M.D. have and recover against Medical X-Ray Center, P.C. the sum of $1,825,695.00, together with post-judgment interest computed from the date of entry of the verdict herein; and, it is further

ORDERED, ADJUDGED AND DECREED that the plaintiff recover its attorneys fees and expenses in the amount of $851,148.00; and, it is further

ORDERED, ADJUDGED AND DECREED the plaintiff's taxable costs in the amount of $_____ to be hereafter taxed and inserted by the Clerk of Courts in favor of the plaintiff.

Dated this ____th day of September, 1995.

_____
WILLIAM F. CLAYTON, Clerk